IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *G.S. v. A.S.*, 2022 NLCA 32
Date: May 25, 2022
Docket Number: 202101H0051

BETWEEN:

G.S. APPELLANT

AND:

A.S. RESPONDENT

Coram: Welsh, Goodridge and Knickle JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, Family Division 201402F0847 (2021 NLSC 84)

Appeal Heard: April 13, 2022
Judgment Rendered: May 25, 2022

Reasons for Judgment by: Welsh J.A.
Concurred in by: Goodridge and Knickle JJ.A.

Counsel for the Appellant: Nicholas J.G. Avis Q.C.
Counsel for the Respondent: Shane R. Belbin

Authorities Cited:

CASES CITED: *Gordon v. Goertz*, [1996] 2 S.C.R. 27; *J.M.M. v. K.A.M.*, 2005 NLCA 64, 251 Nfld. & P.E.I.R. 349; *Sappier v. Francis*, 2004 NBCA 70; *Wiegers v. Gray*, 2008 SKCA 7, 291 D.L.R. (4th) 176; *Brown v. Lloyd*, 2015 ONCA 46; *Hurst v. Carey*, 2015 NLCA 59, 373 Nfld. & P.E.I.R. 35.

STATUTES CONSIDERED: *Children's Law Act*, RSNL 1990, c. C-13, section 35(1).

RULES CONSIDERED: *Court of Appeal Rules*, NLR 38/16, rule 58(4).

Welsh J.A.:

[1] This is an appeal regarding parenting-related issues with respect to one child who is now eight years old. The parents, who were not married, separated approximately two months after the child was born. There is currently a parenting order in place. Increased parenting time for the father, access by the paternal grandparents, and the child's surname are the focus of the appeal.

BACKGROUND

[2] The child was born in May 2014. A parenting order was made in March 2016 granting the parents joint legal custody (the "2016 Order"). That Order took account of the father's work in the offshore oil industry. Over the years, up to the present he has had a schedule alternating three weeks offshore and three weeks onshore. The mother is employed in the public service and works from Monday to Friday. The maternal grandmother cares for the child when both parents are at work.

[3] The 2016 Order provided for a graduated schedule for parenting time for the father for the first four years. The Order states, in relevant parts:

> <u>December 1, 2017 until January 1, 2020</u>
>
> 10. For this period of time, the father shall parent the Child [schedule set out]. The father shall continue to parent each daytime as set out above during his three (3) week rotation onshore, except, of course, when the Child is in school. ...

> After January 1, 2020
>
> 11. The above schedule will remain in place until January 2020, after the Child has started school the previous September after which time, for the time that the father is onshore for his regular rotation home, the Child will be parented as follows: [specific schedule set out].
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> ...
>
> For Subsequent Period – Recommendations Only
>
> 13. This period will be some four (4) years away from the present time. It is difficult now to establish a parenting schedule on an ongoing basis for that time due to uncertainty as to the circumstances for both parents, as well as those of the Child. Many changes could possibly occur by that time, including the possibility that the father's employment may not require his being away, as he is at present. Therefore, only some general recommendations will now be made on a parenting plan going forward to permit the parties to consider a plan that is in the best interests of the Child, at the time. The recommendations are as follows.
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> ...
>
> 16. An exact plan is not set out at this time but the hope is that by then the parents will be able to agree on a schedule that makes sense for them and their Child. It is the Court's view that, no matter what schedule is adopted by the parents, the mother should be provided with parenting time on two (2) of the three (3) weekends the father is onshore, assuming that both parents continue to have similar work schedules as they do at this time.
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> ...

[4] On January 30, 2019, the father filed an application for variation of the 2016 Order (decision of the applications judge, 2021 NLSC 84):

> [3] ... He sought sole decision-making and for [the child] to be in his care during his time onshore except for two non-consecutive overnights per week. He wanted parenting time when unable to go offshore as scheduled and to attend the Christmas parade with [the child] in alternate years. He sought an order for his parents to have contact with [the child] when he is offshore.
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> ...
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> [5] In July 2020, the mother filed her Response to the [application]. She disagreed with the father's proposed parenting arrangements and change to decision-making. She indicated her willingness to discuss parenting at mediation or a settlement conference. She referenced some small changes she would like to the parenting schedule. She claimed basic child support and contribution toward [the child's] extracurricular expenses.

> [6] In his Reply filed October 2020, the father disagreed with mediation and a settlement conference. He indicated his agreement to some of the requested changes raised by the mother in her Response.
>
> [7] The parties did not attend Family Justice Services for mediation ... . They did not participate in a settlement conference. ...

[5] Given that the parents are not married, the applications judge applied section 35(1) of the *Children's Law Act*, RSNL 1990, c. C-13, which provides that an existing parenting order may not be varied "unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child" (decision of the applications judge, at paragraph 14).

[6] The judge dismissed the application for variation of the 2016 Order, having found that there had been no material change in circumstances, and:

> [145] Even had the father been successful in demonstrating that a material change in circumstances has occurred, the evidence tendered did not show that a change to the existing parenting arrangement would be consistent with [the child's] best interests. ...
>
> ...
>
> [147] It is most unfortunate that the father refused mediation with Family Justice Services and the parties did not participate in a settlement conference. Much may have been accomplished and the within trial potentially avoided.
>
> [148] As I have determined that there has been no material change in circumstances relative to [the child's] best interests since the 2016 parenting order, I cannot consider a variation of that order.

[7] Accordingly, the judge dismissed the father's application for variation of the 2016 Order.

ISSUES

[8] The issues in this appeal are:

> (1) Whether it is necessary to demonstrate a material change in circumstances in order to alter the parenting arrangement and, if so;
>
> (2) Whether the judge erred in concluding that there had been no material change in circumstances relative to the best interests of the child;

(3) Whether the Court has jurisdiction to address the question of access by the paternal grandparents; and

(4) Whether the mother breached the 2016 Order with respect to the child's surname.

ANALYSIS

Parenting Time – Material Change in Circumstances

Effect of the 2016 Order

[9] The father submits that the 2016 Order expired four years after it was made. He points to the fact that the Order specifies "Recommendations Only" for the period after four years (paragraph 3, above). If the 2016 Order has expired, the father submits that the requirement for a material change in circumstances does not apply because there is no order in place to vary. I do not accept this proposition.

[10] There is a presumption that, unless varied, a parenting order will remain in effect until the child is no longer a child within the meaning of the legislation. For purposes of this case, it is unnecessary to consider circumstances when it may be open to a judge to specify an end date when the order would expire, or a date when the order would be reviewed. The judge did not take either of these actions. This stands in contrast to the decisions in *J.M.M. v. K.A.M.*, 2005 NLCA 64, 251 Nfld. & P.E.I.R. 349, where the order made provision for a variation without the need for a material change in circumstances; and in *Sappier v. Francis*, 2004 NBCA 70, in which the order specified that a review would be conducted within approximately six months.

[11] In making recommendations only, the judge provided flexibility for the parties to make adjustments to the parenting schedule without the need to obtain a court order or to establish a material change in circumstances. Nonetheless, it is clear that the judge intended that the Order would continue in effect beyond the four-year period. Clause 11, quoted above, became effective on January 1, 2020, less than four months before the four-year period would expire in March 2020. It would be unreasonable for the judge to specify a new schedule at that time if, in fact, the Order was intended to expire four years after it was issued in March 2016.

[12] A similar conclusion follows from consideration of the clauses in the 2016 Order under the title, "Recommendations Only". For example, the Order provides:

> 13. ... Therefore, only some general recommendations will now be made on a parenting plan going forward to permit the parties to consider a plan that is in the best interests of the Child, at the time. The recommendations are as follows.
>
> …
>
> 16. An exact plan is not set out at this time but the hope is that by then the parents will be able to agree on a schedule that makes sense for them and their Child. …
>
> (Emphasis added.)

These statements clearly indicate an intention that the Order will continue in place unless altered by agreement of the parties.

[13] In the result, there is no basis on which to conclude that the 2016 Order expired after the passage of four years. It follows that, in the absence of agreement, the ordinary procedure for varying the terms of the Order would apply, including the requirement for a material change in circumstances. Alternatively, as suggested by the judge, it was open to the parents to attend a settlement conference or mediation for the purpose of concluding an agreement.

Material Change in Circumstances

[14] Where parents are unmarried, a variation of a parenting order is governed by section 35(1) of the *Children's Law Act*, which provides:

> A court shall not make an order under this Part that varies an order in respect of custody or access made by a court in the province unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child.

[15] In determining what is meant by a material change in circumstances, the applications judge referred to the decision in *Gordon v. Goertz*, [1996] 2 S.C.R. 27:

> [12] ... Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: ... . The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: ... . Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place" ... .

[16] In this case, the father submits on appeal that the passage of time is a basis on which to ground a material change in circumstances. However, while a child's advancing age may be relevant, it is not an automatic basis for finding a material change in circumstances. In *Wiegers v. Gray*, 2008 SKCA 7, 291 D.L.R. (4th) 176, Smith J.A., for the Court, explained:

> [25] ... It is my view that mere passage of time and increased maturity of the child does not, in and of itself, constitute a material change of circumstances as is required by s. 17(5) of the *Divorce Act* and the case law that has interpreted that section. Were it otherwise, there would be an automatic right to seek variation of custody orders on a regular basis every few years. This is clearly contrary to the established law. While the reviewing judge may, of course, take into account that a child's needs may change as he or she matures, it is necessary to go further to determine whether and to what extent those changes have, in the case before the reviewing judge, made the original order inadequate.

See also, *Brown v. Lloyd*, 2015 ONCA 46, at paragraph 11.

[17] The same principle applies under the *Children's Law Act*. In this case, the current parenting schedule was set in January 2020 after the child had started school. The father has not provided a rationale for concluding that the child's change in age from six to eight years would, alone, support a finding of a material change in circumstances, particularly where a new schedule had been put in place just months before the child turned six in May 2020.

[18] The father also submits on appeal that, at the hearing of the variation application, the mother consented to an increase in his parenting time. During cross-examination, the mother, who was not represented by counsel, said:

> [The father] wants more time. I have no issues with [the father] receiving more time.

[19] I accept the submission of the mother's counsel regarding that statement and explaining that, read in context and in light of the mother's closing submissions at the hearing, the mother was not consenting to a variation of the 2016 Order. Rather, she was indicating a readiness to discuss an increase in the father's parenting time as part of mediation or settlement discussions. Further, the mother specifically stated that she would not agree to an increase of sixteen days as requested by the father, but that, if there was an increase, it should be limited to fourteen days. In her closing submissions, the mother stated:

> My argument, I guess, on this is there [has] been no material change in circumstances that affect[s] or is likely to affect the best interests of the child.

[20] I am satisfied that the mother's statement that she had no issues with the father having more parenting time would not provide grounds for finding a material change in circumstances.

[21] At the variation application, it was the position of the father that the mother has failed to comply with the terms of the 2016 Order, "and there has been a consistent campaign by her to push the father, and his family, out of [the child's] life, along with [an] ongoing effort to interfere with the father's parenting time" (decision of the applications judge, at paragraph 21). It was the father's submission that the mother's conduct is proof that the Order is not working, and that this demonstrates a material change in circumstances.

[22] The judge addressed this submission by reference to specific issues. Each of these was dismissed by the judge, with reasons. In light of the analysis and reasons provided by the judge regarding the issues that were raised on appeal, I am satisfied that there is no basis on which to disturb the judge's findings of fact and her conclusion that these issues alone, or together, did not result in a material change in circumstances.

[23] First, the parents took differing views on the child's attachment to an item of his mother's night wear, which he took with him when he was residing with his father, and which went missing on a camping trip with the father. The judge concluded that there was no evidence that the child's attachment to the item of clothing, its disappearance, or comments made about it by either parent "had any impact on [the child's] best interests", or that these issues constituted a material change in circumstances (decision of the applications judge, at paragraph 33).

[24] Second, the father alleged that the mother had made threatening statements during a parental counselling session. The applications judge dismissed this allegation:

> [38] Based on the independent evidence of [the counsellor], I find that the mother did not threaten the father in May 2018 and her statement did not indicate the mother's desire to remove the father from [the child's] life. The statement made does not constitute a material change in circumstances.

[25] Third, the father complained that the mother had a new partner and that he had not been advised when that person was introduced to the child. The judge concluded that there was insufficient evidence on which to find that the mother had failed to comply with the 2016 Order:

> [45] I do not find that anything related to the relationship between the mother and R.K. demonstrates non-compliance with the 2016 parenting order or a desire to push the father out of [the child's] life. It does not constitute a material change in circumstances.

[26] Fourth, the father alleged that the mother was using FaceTime visits with the child in an effort to interfere with his time with the child. In addition, the father submitted that the mother interfered with his access to FaceTime visits with the child. After reviewing incidents raised by the father, the judge concluded:

> [53] Nothing that I heard about FaceTime between the child and either of his parents constitutes a material change in circumstances.

[27] Fifth, regarding access by the paternal grandparents to the child, the judge concluded:

> [59] It is clear the paternal grandparents have significant contact with [the child] when the father is onshore. I do not find that the decrease in contact between them and [the child] during the father's time offshore is due to the mother's desire to remove them, or the father, from [the child's] life. The father's dissatisfaction with the access between his parents and [the child] while the father is offshore does not constitute a material change in circumstances.

[28] Finally, the father submitted that the mother "involves [the child] in making parenting decisions." The explanation for this submission is that the mother did not encourage the child to contact his paternal grandparents. Rather, the mother "testified that [the child] is aware he can contact his grandparents at any time" (decision of the applications judge, at paragraph 57). The father suggested that this results in the child making parenting decisions, a position which the judge rejected.

[29] After reviewing the many issues raised by the father, the applications judge concluded:

> [139] As I have indicated throughout, I do not find that the issues raised, individually, constitute a material change in circumstances since the 2016 parenting order. I have also considered whether collectively they do. I conclude they do not.

[30] In summary, for the reasons set out in her decision, I am satisfied that the applications judge did not err in her analysis of the evidence and the law and in her conclusion that the father failed to establish on a balance of probabilities that there had been a material change in circumstances on which to ground a variation of the 2016 Order.

Access by the Paternal Grandparents

[31] In his application, the child's father sought an order regarding access time for the paternal grandparents when he is working offshore. In refusing that request, the judge explained:

> [58] [The paternal grandmother] desires court-ordered time with [the child] when the father is offshore. I presume her husband does as well but he was not called to testify. The father wants his parents to have this time. The paternal grandparents are not parties to this action. No separate Originating Application was filed by them. If one was, it would need to have been previously joined with the within application for an order in the nature requested to be made. The paternal grandparents have no claim before the Court.

[32] This is a correct statement and application of the law. See, for example, *Hurst v. Carey*, 2015 NLCA 59, 373 Nfld. & P.E.I.R. 35, at paragraphs 16 and 17.

The Child's Surname

[33] The 2016 Order provides that the child's surname shall be a hyphenated surname comprised of a combination of the mother's surname followed by the father's surname. The father's complaint is not with the Order, but with the alleged failure of the mother to comply with the Order.

[34] The applications judge noted that the child's name has been officially changed, for example, in the vital statistics records. Further, she found as a fact that the use of incorrectly stamped name tags and a juvenile "name song" taught by the mother when the child was young did not demonstrate an effort by the mother to exclude the father and did not constitute a material change in circumstances. There is no basis on which to find error by the applications judge.

Costs

[35] The mother requests costs of the appeal at a level higher than column 3 under the scale of costs. Pursuant to rule 58(4) of the *Court of Appeal Rules*, NLR 38/16, the Court has discretion to award costs

> ... in accordance with any column or combination of columns ..., and in exercising its discretion ..., the Court may consider:
>
> ...

> (d) the manner in which the proceeding was conducted, including any conduct that tended to shorten or unnecessarily lengthen the duration of the matter;
>
> ...

[36] The mother points to the history of the proceedings with two trials and three appeals involving a child who has just turned eight years old, and the refusal of the father to participate in mediation or settlement discussions even though the mother indicated her willingness to consider additional parenting time for the father. The judge opined that, had the parties availed of settlement or mediation opportunities, "[m]uch may have been accomplished and the within trial potentially avoided" (decision of the applications judge, at paragraph 147).

[37] While I agree that the father's conduct has led to protracted litigation, I am not satisfied that there are sufficient grounds at this stage to warrant an award of costs at an increased level. Although mediation and settlement options are strongly encouraged in order to reduce the level of conflict in the family law context, there are circumstances where a party may believe that pursuing those options would not be fruitful.

[38] In the circumstances, I would award the mother, as the successful party, costs of the appeal for one counsel under column 3 of the scale of costs in the *Court of Appeal Rules*. The mother did not request a change to the order regarding costs in the court appealed from.

SUMMARY AND DISPOSITION

[39] In summary, the applications judge did not err in concluding that:

> (1) The 2016 Order could be varied only if the father demonstrated a material change in circumstances;
>
> (2) There was no material change in circumstances;
>
> (3) The grandparents were not parties to the application and, therefore, had no claim before the Court; and
>
> (4) The mother had not breached the 2016 Order with respect to the child's surname.

[40] Accordingly, I would dismiss the appeal, with costs of the appeal under column 3 of the scale of costs.

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B.G. Welsh J.A.

I concur: _____

W.H. Goodridge J.A.

I concur: _____

F.J. Knickle J.A.